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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 792

SAUL I. BIRNBAUM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. A1–A11) is reported at 402 F. 2d 24.

JURISDICTION

The judgment of the court of appeals was entered on October 2, 1968. Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to December 3, 1968, and on December 3, 1968, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court erred in refusing to place petitioner on probation after his appeal had been con-

cluded because the judge at the time he originally sentenced petitioner to a year in prison, said he "might" impose probation if he became convinced "upon an impressively convincing showing" that petitioner had "realigned his sights," and petitioner took substantial steps in an effort to meet the condition.

STATEMENT

After a jury trial in the Southern District of New York, petitioner, a certified public accountant, was convicted on two counts of an indictment which charged a conspiracy with Harold Simon, an Internal Revenue Service Agent, to have Simon corruptly audit certain tax returns of Alexander L. Guterma, Robert C. Leonhardt and McGrath Securities Corporation, and that petitioner brought about the payment of a bribe to Simon (18 U.S.C. 371; 18 U.S.C. 201, 202). The facts underlying the conviction developed at the second trial of the offense,[1] are set forth in considerable detail in the opinion affirming the conviction. 373 F. 2d 250, certiorari denied, 389 U.S. 837. They showed, *inter alia,* that petitioner told his confederates in the sale of unregistered stock that he "had had lots of dealings with Internal Revenue agents and he knew which ones of them could be taken care of."

At the time of sentencing on April 1, 1966, petitioner's counsel argued that petitioner was "a man not in need of rehabilitation because it is hard to conceive of a person more productive and living

[1] A prior conviction was reversed. 337 F. 2d 490.

a more honest and responsible life than Mr. Birnbaum does as he is here today" (S. Tr. 2176).[2]

Prior to imposing sentence, Judge Cooper, apparently responding to counsel's argument, noted that petitioner had advanced from an economically deprived boyhood to an overwhelmingly secure economic status, but that petitioner had given nothing back to the community, and that petitioner's sense of value was warped, although he believed petitioner did have the instinct to respond to the outcry of the unfortunate. He then said:

> However, now is not the time to explore that phase, for you have not accepted the jury's verdict and faced up to its import. You protest your innocence and you are on the way to appeal. Certainly that is your legal right.
>
> For the present, then, in the light of your fame [sic] of mind, let me just add that if your conviction is sustained, this Court *might,* and *I emphasize might,* upon an impressively convincing showing that you have realized, or rather realigned, your sights and devoutly wish to give a hunk of yourself as well as your wealth in doing with constancy those acts which will really help your fellow Americans and at the same time enhance you [sic] personal well-being immeasurably, I say this Court *might* consider * * * a program of rehabilitation without confinement as provided for by 18 United States Code, Section 3651. [Emphasis supplied.] (S. Tr. 2182–2184).

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[2] "S. Tr." refers to the Sentencing Transcript, a copy of which we are filing with the Clerk of the Court. Other references used herein are the same as those used by petitioner. See Pet. p. 2 n. 2.

The Court then sentenced petitioner to a year in prison (this was six months less than the 18 month sentence imposed at the first trial).

After the denial of the petition for a writ of certiorari from the affirmance of the conviction, petitioner, through new counsel, filed a motion for reduction and suspension of sentence. He alleged that, aided by Justice Heller of the New York Supreme Court,[3] petitioner had begun a program of work in varied charities and that, while the Justice had "provided the necessary initial introductions," petitioner had since been able to find his own way. He said that since sentencing, he had contributed $82,000 and made commitments for $35,000 more. Also set forth were the activities in which petitioner had engaged, a review of his background and a recital of the difficulties and stress he had been under since the first trial. In response, the government noted that petitioner's bribery of Agent Simon had been shown to have been undertaken to conceal a fraudulent sale of stock from which petitioner had netted $190,000; that petitioner's bribe of Simon did not appear to be an isolated transaction, and that petitioner still did not concede guilt (CN Ex. 2, pp. 4–5). In argument on the motion, former Federal Judge Simon Rifkind, petitioner's new counsel, noted that a judge could act under Rule 35 on his own motion and said he was stressing that fact because "I assign no error to the original judgment, to the first sentence." He noted Judge Cooper's known interest in probation as an instrument of moral re-

[3] Judge Cooper had referred to Justice Heller's interest in petitioner at the time of the original sentence (see ft. 4 at Pet. 5).

education and set forth the factors that he thought warranted probation (CN Ex. 4, pp. 10–22, 29–30, 33, 34). Government counsel pointed out in reply, *inter alia*, that when the talk was about rehabilitation, "it seems to me that one of the things you are talking about is having the person stop saying everyone is taking advantage of him when the record, nor [sic] rumor, not hearsay, not insinuation establishes the facts that he better face." (CN Ex. 4, pp. 37–38). Counsel pointed out that the defrauding of the public and the bribe were committed by a wealthy man without personal responsibilities who showed he believed that money buys anything and that contribution of money to charity did not show a change in that philosophy. (CN Ex. 4, pp. 40–41). At the conclusion of the hearing, the judge said that he would have the probation report brought up to date (CN Ex. 4, p. 44).[4] On December 6, Judge Cooper ruled that after "long and careful consideration to all of the facts and circumstances of this case, including the defendant's background, the nature and gravity of the offense of which he stands convicted, the probation report from which I have obtained the greatest possible assistance," he was satisfied that the sentence should not be disturbed (Pet. App. A–12).

In a petition for reargument, petitioner set forth in greater detail his efforts on behalf of various charities and offered testimonials by various people in his be-

[4] While the court of appeals opinion states that this was the first report prepared by the probation department, Pet. App. A–5, n. 4, the transcript of the sentencing indicates that the judge did have a presentence report at that time (S. Tr. 2161, 2167).

half. Judge Cooper nevertheless adhered to his former decision, stating that he had been moved by the faith demonstrated by those who signed statements on petitioner's behalf and the high-minded citizens who called on the judge; that he had given the case "reflection seemingly without end," had estimated "the extent of defendant's activities since imposition of sentence" and had weighed "the justice due community and defendant alike." (Pet. App. A–12).

Petitioner then moved before Judge Wyatt for a writ of error coram nobis seeking the grant of probation and asking that Judge Cooper be disqualified on the ground that he was a material witness. In an affidavit annexed to the motion, petitioner stated that after the original sentencing proceeding on April 1, 1966, his attorneys told him they took Judge Cooper's statement to mean that if during the then forthcoming appeal "I were to involve myself substantially in philanthropic activities and if thereafter the conviction were affirmed, Judge Cooper would in all probability suspend the sentence and grant me probation."

He then recited that he showed the sentencing minutes to Justice Heller and told him he was troubled about his sentence and how to comply. Justice Heller met Judge Cooper at a fraternal organization dinner and told him of petitioner's puzzlement. Judge Cooper reportedly remarked to Justice Heller " * * * if he doesn't know, why don't you guide him? * * * why don't you act as his unofficial probation officer and show him the ropes?" It is said that "Justice Heller agreed to so so" and that Judge Cooper indicated approval of three suggested charities with which peti-

tioner might become involved. Justice Heller then visited the three organizations and arranged for petitioner's introductions. Sometime thereafter, Justice Heller told petitioner he had met Judge Cooper at a theatre and "as the unofficial probation officer" reported that petitioner was actively and financially identified with the organizations that Justice Heller had recommended and others that petitioner had sought out. Judge Cooper reportedly replied: "That's good, that's fine." C.N.A. Ex. 2.[5]

Counsel's affidavit annexed to the motion alleged that "* * * in the factual circumstances presented, Judge Cooper was under a constitutional duty to grant Birnbaum probation after Birnbaum for eighteen months engaged in the charitable activities * * * with the knowledge and approval of Judge Cooper;" that the denial of probation was "arbitrary and without a constitutionally adequate statement of findings or reasons" (p. 5). In a memorandum in support of the application, counsel argued that, in effect, petitioner had been compelled to pay a large fine and had already been placed on probation. Judge Wyatt denied the motion without a hearing (Pet. App. 13).

Appeals from the denial of the Rule 35 motion by Judge Cooper and the coram nobis motion by Judge Wyatt were consolidated. The court of appeals affirmed both judgments.

[5] No affidavit from Justice Heller was submitted to support these statements in petitioner's affidavit.

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ARGUMENT

1. Petitioner's basic contention is that he is now entitled to be placed on probation because at the time Judge Cooper imposed the one year sentence of imprisonment he stated that if petitioner's conviction was sustained on appeal, "This Court might, and I emphasize might, upon an impressively convincing showing that you * * * realigned your sights * * * this Court might consider * * * a program of rehabilitation without confinement * * *." We submit, however, that the sentence of one year's imprisonment originally imposed was eminently fair and that nothing in Judge Cooper's statement or subsequent acts entitle petitioner to be relieved of the prison sentence which his crime clearly merited.

The record supports the conclusion that Judge Cooper did—as he said he did—weigh "the justice due community and defendant alike" and reasonably determined that the original sentence should not be disturbed. The sentence of one year's imprisonment which petitioner originally received is a particularly mild one in view of the facts of this case. The crime of bribing a government official is one which strikes at the heart of our governmental process and is aggravated by the fact that it was here engaged in by one who has derived great benefits from our society. Nor is it irrelevant that testimony at the trial portrayed petitioner as boasting that "he had lots of dealings with internal revenue agents and he knew which ones of them could be taken care of and this was one." See 373 F. 2d 250, 254. In addition, as the court of appeals noted on the appeal from petitioner's conviction, the

evidence supported the conclusion that the purpose of the bribe was not merely to evade taxes for a client, but also "to avoid an SEC investigation" of the stock transaction giving rise to the tax liability—a transaction from which petitioner had derived profits of $190,000. See 373 F. 2d at 255–56. In these circumstances, it is fair to say that Judge Cooper was most lenient in imposing a one year sentence on petitioner—a sentence which was six months less than that imposed by Judge Murphy after petitioner's first trial and six months less than the eighteen months sentence which the revenue Agent involved had already served.[6]

Judge Cooper's remarks at the time of sentencing must be considered against this background and in the light of the fact that counsel was arguing that petitioner had already been rehabilitated. Judge Cooper was trying to explain what he deemed true rehabilitation to be, a giving of oneself to others. We think it is unfortunate that Judge Cooper phrased his remarks in such a way that petitioner could interpret them as suggesting that he might escape the imprisonment which his conduct merited by contributions to charity of money or time. In our view, the wiser course would have been to refrain from raising such hopes. But it is at least clear from Judge Cooper's remarks as to "an impressively convincing showing" that petitioner had "realigned" his sights, that the judge meant something more than the act of giving money or time; that he was talking about a change

[6] It is thus clear that petitioner is incorrect in asserting that at the time of sentencing Judge Cooper did not consider relevant factors in mitigation (See Pet. 24–26).

of outlook or philosophy. Moreover, the judge did make it entirely clear that he was not making any promises. He stressed the word "might." If he promised anything, he promised only to consider the possibility of probation if petitioner made an impressively convincing showing that he had realigned his sights.

Nor did the judge's actions after the sentence was imposed improperly mislead the defendant into thinking that he was being promised probation. While petitioner relies heavily on his allegations concerning Judge Cooper's conversations with Justice Heller (Pet. 38–40), it is important to note that, even accepting petitioner's allegations,[7] Judge Cooper did not seek out Justice Heller to ask him to direct petitioner's action; rather, on two occasions petitioner's friend Justice Heller approached Judge Cooper at social functions to discuss petitioner's activity. Moreover, petitioner's assertions that Justice Heller became petitioner's unofficial probation officer may overstate the justice's involvement somewhat. In the letter which Justice Heller sent to Judge Cooper in connection with petitioner's motion to reduce sentence, Justice Heller referred to Judge Cooper's statement at sentencing and then stated:

> Mindful of the perceptive and wise remarks you then uttered, I undertook, as a friend to help guide the defendant toward a path of service and dedication to the community and his fellow man. I introduced him to leaders of three (3) outstanding communal and charitable en-

[7] As noted above no affidavit from Justice Heller was ever submitted.

> deavors, but not without first explaining to these men the nature of his conviction, and of your statement. * * *
> * * * I might add that this was the only extent of my participation in this rather unusual experience at helping to rehabilitate a man whose life in the past (as you so properly assessed it) had been involved solely with making money." [Amicus Br. pp. 18–19].

Thus, the record establishes that Judge Cooper in no way indicated that he was promising petitioner probation. Indeed, even after Judge Cooper had denied petitioner's motion to reduce sentence, petitioner's counsel recognized that there had been no promise of probation. In seeking to stay petitioner's sentence, counsel argued that petitioner needed time to arrange his affairs and stated, "Perhaps Birnbaum was overly optimistic about the possibility that Judge Cooper would grant his application." (Affidavit of Joseph J. Ackell in Support of the Motion for an Extension of Time in Which to Surrender, dated December 8, 1962). Moreover, in none of the arguments before Judge Cooper was it ever suggested to him that he promised petitioner that he would be placed on probation.[8]

[8] This case is thus distinguishable from *Saldana* v. *United States*, 365 U.S. 646, where the judge who accepted the defendant's guilty plea unequivocally promised him a sentence of five year's imprisonment, saying "I will keep my word and I will make it five years to run concurrently" (Brief for the United States, *Saldana* v. *United States*, No. 176, October Term, 1960, p. 8). The reason that the 5-year sentence was not im-

Whether the showing petitioner made at the time of the motion to reduce was the impressively convincing showing to which Judge Cooper had referred was a matter for Judge Cooper to decide. As noted above, the one-year sentence was a lenient one. While it is true that petitioner had engaged in charitable activities during the time his conviction was being appealed, it did not necessarily follow that he had "realigned his sights." Petitioner's commitment of something more than $100,000[9] to charity is not wholly impressive when it is remembered that he made a profit of $190,000 on the stock deal which led to the bribe in question. Moreover, as the government noted in its argument before Judge Cooper (CN Ex. 2, pp. 405), petitioner did not commend himself for probation by refusing to acknowledge culpability even after full appellate review and a finding by all the appellate judges that the evidence of guilt was overwhelming.

In sum, we believe that in view of all the circumstances presented, the sentence of one year's imprisonment was appropriate, and that the trial court did not act improperly in refusing to reduce that sentence.

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posed immediately was that the government wished to delay the sentence until after Saldana had testified at the forthcoming trial of his co-defendant. Thereafter, however, the co-defendant became a fugitive and the sentencing came before a different judge, who vacated the guilty plea and, after a jury trial, sentenced Saldana to 20 year's imprisonment. This Court, in effect, enforced the promise made by the first judge.

[9] In this regard it is significant to note that the additional presentence report prepared in connection with the motion to reduce contained an assessment of petitioner's wealth (CNM p. 41).

2. There is no basis for petitioner's assertion that Judge Cooper's refusal to reduce sentence "was in retribution for the arguments made by counsel on appeal. * * *" (Pet. 31). From the beginning, Judge Cooper anticipated that the propriety of his charge would be one of the issues raised on appeal (S. Tr. 2157). Nor was Judge Cooper's decision not to reduce sentence made precipitously. After extensive papers were filed by both petitioner and the government, the judge heard oral orgument on November 15, 1967. The transcript of that argument reflects that petitioner's counsel was treated with the greatest courtesy and that the judge was deeply concerned with reaching a proper decision in the case (CN Ex. No. 4, pp. 2–3; 43–44). Moreover, the judge delayed his decision on the motion until he could receive a further report concerning petitioner from the probation department. It was only after this report was received that on December 6, 1967, Judge Cooper denied the motion to reduce the sentence. Thereafter a motion for reconsideration was submitted. In ultimately denying relief on January 4, 1968, Judge Cooper stated:

> Upon reflection seemingly without end and after estimating the extent of defendant's activities since imposition of sentence and weighing the justice due community and defendant alike, on the merits I am constrained to and do grant the motion for reargument and upon such reargument adhere to the denial entered upon the original application on December 6, 1967.

In view of the careful consideration which Judge Cooper gave to petitioner's motion over an extended

period of time—during which petitioner remained free on bail—it is unreasonable to suggest that the judge denied petitioner's motion because he was angered by the appellate argument.[10] To be sure, it is regrettable that Judge Cooper's extemporaneous comments at sentencing about the possibility of probation should have furnished the predicate for such a claim. But the fact is that Judge Cooper's decision to adhere to the original sentence—lenient as it was—was fully justified by legitimate considerations and there is no indication that his ruling was otherwise premised. To indulge suspicions in these circumstances would seem to press too far a proper concern for "appearances." In our view, even the most "fastidious regard for the honor of the administration of justice" (*Communist Party* v. *Subversive Activities Control Board*, 351 U.S. 115, 124) does not require impugning the integrity of a judge on such a basis.

3. Nor is there merit to petitioner's argument that Judge Cooper's suggestion that he might subsequently reduce sentence rendered the entire proceeding invalid. The sentence of imprisonment originally imposed was no more tentative than any other federal sentence which remains subject to reduction under Rule 35 after the appellate process has been completed. If the existence of power to change a sentence is deemed to be an unconstitutional impediment to an

[10] It is worth noting that no such contention was advanced when petitioner's counsel moved for a writ of error *coram nobis* before Judge Wyatt. In that motion counsel argued only that Judge Cooper had been swayed by the government's argument as to the serious nature of the crime and that Birnbaum was unworthy of probation.

attack on rulings by a district judge on appeal, then the entire procedure for reduction of sentence spelled out in Rule 35 is subject to the same deficiency. Yet that procedure was found sufficiently desirable so that, in the amendment to the Rules of Criminal Proc dure the period in which the court may act was doubled from 60 to 120 days.

As we have observed above, it is unfortunate that Judge Cooper was as explicit as he was as to what factors he would consider in exercising his power to reduce sentence. It cannot be said, however, that this made the sentence tentative. Petitioner's counsel before the district court did not so consider it. He stated that he was not attacking the original sentence but was merely asking the judge to exercise his power under Rule 35 to consider conditions as of the date of the motion.

CONCLUSION

Petitioner says, in effect, that he was misled by Judge Cooper, and argues that the hope raised by Judge Cooper should be enforced by a sort of estoppel in order to avoid the appearance of an injustice. But the appearances work both ways. It is not good for the administration of justice that it should appear that a wealthy man can avoid a jail sentence by gifts of his money and time to charity. It is not good for the administration of justice that the instigator of a bribe should be placed on probation while the government official who received the bribe has served a term in prison.

The situation is an unfortunate one, which should provide lessons for the future. But, in the light of all the facts, the decision reached below should stand. The petition for a writ of certiorari should be denied.

Respectfuliy submitted.

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